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No. 99-1189

IN THE

Supreme Court of the United States

THERESSA RAINS JOHNSON,

Petitioner,

v.

ANN W. ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state probate statute, which states that no bona fide purchaser of real property from an estate shall be required to examine any proceedings before the order of sale, violate an heir's right to due process as guaranteed by the Fifth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are set forth in the caption.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida in Johnson v. Anderson, Case No. 95,867, may be found at 744 So. 2d 454 (1999). The opinion of the Florida District Court of Appeal in Anderson v. Johnson, Case No. 98-1781, may be found at 732 So. 2d 423 (1999).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this proceeding under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Fla. Stat. § 733.613 (1999) (Personal representative's right to sell real property) provides:

> (1) When a personal representative of a decedent dying intestate, or whose testator has not conferred upon him or her a power of sale or whose testator has granted a power of sale but his or her power is so limited by the will or by operation of law that it cannot be conveniently exercised, shall consider that it is for the best interest of the estate and of those interested in it that real property be sold, the personal representative may sell it at public or private sale. No title shall pass until the sale is

authorized or confirmed by the court. Petition for authorization or confirmation of sale shall set forth the reasons for the sale, a description of the property sold or to be sold, and the price and terms of the sale. Except when interested persons have joined in the petition for sale of real property or have consented to the sale, notice of the petition shall be given. No bona fide purchaser shall be required to examine any proceedings before the order of sale.

(2) When a decedent's will confers specific power to sell or mortgage real property or a general power to sell any asset of the estate, the personal representative may sell, mortgage, or lease, without authorization or confirmation of court, any real property of the estate or any interest therein for cash or credit, or for part cash and part credit, and with or without security for unpaid balances. The sale, mortgage, or lease need not be justified by a showing of necessity, and the sale pursuant to power of sale shall be valid.

Fla. Stat. § 733.614 (1999) (Powers and duties of successor personal representative) states:

> A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate as expeditiously as possible, but he or she shall not exercise any power made personal to the personal representative named in the will.

STATEMENT OF THE CASE

Procedural History

The Petitioner Theressa Rains Johnson brought an action for partition against the Respondent Ann W. Anderson in the Circuit Court for Marion County, Florida (Case No. 98-1781). Anderson counterclaimed to quiet title to the property, which she had purchased from the estate of Edward Williams pursuant to a conveyance executed in conformance with §733.613, Florida Statutes (1996). After a nonjury trial, the court declared the statute unconstitutional and ruled that Johnson owned an undivided 20 percent interest in the property. The court appointed commissioners "to make partition

or make a finding to the Court that the property is indivisible" and denied Anderson's counterclaim.

Anderson appealed to the Florida District Court of Appeal, Fifth District. In an opinion filed April 23, 1999, the court reversed the partition order. It found no basis for declaring §733.613 unconstitutional and concluded that Anderson had taken title to the real property pursuant to a probate court order on which, by statute, she was entitled to rely. The court denied Johnson's Motion for Rehearing in an order dated May 20, 1999. In an order filed October 22, 1999, the Supreme Court of Florida denied to accept jurisdiction and denied Anderson's Petition for Review. It stated that it would not entertain a Motion for Rehearing.

Johnson then filed this Petition for Writ of Certiorari in this Court on January 18, 2000.

Facts

The real property in question was owned by Edward Williams, who died in 1960. He was survived by several children, including Davis Williams. Although probate proceedings were begun, the estate of Edward Williams was closed without a final disposition of the real property.

Davis Williams died testate in October, 1995. His stepdaughter Theressa Rains Johnson, the Respondent, was his

sole survivor and sole named beneficiary. In November, 1995, the will of Davis Williams was filed with the Clerk of the Circuit Court for safekeeping, although a petition to admit the will to probate was not filed at that time.

In early 1996, Bert Coleman, acting on behalf of the heirs of Edward Williams, entered into a contract to sell the property to Anderson. In March, 1996, Johnson informed Coleman that she wanted her interest in the land to build a home. Coleman then petitioned the Probate Court to reopen the Edward Williams estate for a determination of heirs and the appointment of a successor personal representative. Johnson was not given any notice of the petition. In an order dated June 5, 1996, the Probate Court reopened the estate, appointed Coleman as successor personal representative, and determined the heirs of Edward Williams. Johnson was not listed as an heir. The court also authorized the sale of the real property to Anderson. She took title to the property on June 28, 1996, pursuant to a deed from Coleman. Coleman directed the closing agent to send a check to Johnson for her interest, but she rejected it.

In August, 1996, Johnson filed a petition to admit the will of Davis Williams to probate and to amend the order determining heirs and authorizing the sale of the property. Anderson did not receive notice of this action. The Probate Court ruled, by order dated February 4, 1997, that Coleman lacked authority to sell the interest of the estate of Davis Williams in the property and that the conveyance to Anderson excluded that interest.

Johnson then sued Anderson for partition; Anderson counterclaimed to quiet title. The county circuit court, sit-

ting without a jury, ruled that Johnson owned an undivided 20 percent interest in the property and declared that Fla. Stat. §733.613 was unconstitutional.

The Florida District Court of Appeal, Fifth District, held that the trial court erred in finding the statute unconstitutional. Finding that Anderson had no knowledge of Johnson's existence or of her claim, the court concluded that Anderson was in no way at fault. Anderson's only notice of Johnson's interest would have been constructive notice, stemming from the recording of the will, which did not indicate to Anderson that Johnson had refused to authorize the sale of her interest in the property. The court concluded that Anderson was entitled to rely on the June 6, 1996, order of the Probate Court that gave Coleman the right to sell the property.

ARGUMENT -A STATE PROBATE STATUTE, WHICH STATES THAT NO BONA FIDE PURCHASER OF REAL PROPERTY FROM AN ESTATE SHALL BE REQUIRED TO EXAMINE ANY PROCEEDINGS BEFORE THE ORDER OF SALE, DOES NOT VIOLATE AN HEIR'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS

The Petitioner takes the position in this case that the Florida District Court of Appeal improperly reversed the trial court's partition order in her favor and should have affirmed the trial court's holding that Fla. Stat. §733.613 was unconstitutional under the circumstances of this case. The Petitioner's contentions are unsupported by the prior decisions of

this Court, and her Petition should be denied for the following reasons.

A. This Court should decline to consider this constitutional issue, as it was not raised in the pleadings in the state court.

The review of a state court decision by this Court may be barred by a petitioner's failure to raise constitutional claims in the state court. In Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), this Court stated that "[it] was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

Although the Florida trial court did consider the constitutionality of Fla. Stat. §733.613, the Petitioner never raised this issue in her pleadings. In addition, the Petitioner seems to have raised for the first time in her Petition to this Court the issue of the constitutionality of Fla. Stat. §733.614, which provides that a successor personal representative of an estate has the same power and duty as the original personal representative.

In short, only now does the Petitioner seek to hang her hat, jurisprudentially speaking, on the peg of unconstitutionality. In that sense, she has raised the constitutionality issues here for the first time, and this Court should decline to consider them for that reason.

B. The statutes of which the Petition complains represent a constitutional exercise of the State's power with which this Court should not interfere.

This Court has long recognized that nothing in the Constitution forbids a state legislature from limiting, conditioning, or abolishing the power of testamentary disposition over property within its jurisdiction. See Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). Due process requires, of course, that a state action affecting property must generally be accompanied by notification of that action. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), this Court observed:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane cautioned, however, that "if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." Id., at 314-15.

In applying the principles of Mullane in the years since that decision was rendered, this Court has balanced the inter-

est of the State and the individual interest sought to be protected by the Fourteenth Amendment. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 484 (1988). The Court recognized that, as the State "undeniably has a legitimate interest in the expeditious resolution of probate proceedings," a State could reasonably conclude that the swift settlement of estates is of considerable importance. Id., at 489.

This Court has on many occasions given deference to the actions of the people of a State through their legislature to regulate property rights. See, e.g., Labine v. Vincent, 401 U.S. 532, 536 (1971)(holding that the Louisiana statutory intestate succession scheme is within the State's power to establish rules for, inter alia, the disposition of property). This Court has also recognized that the Federal Constitution does not give it the power to overturn the State's choice of rules merely because the Justices believe that they can provide better rules. Id., at 538. It is beyond question that a State has the power to make laws for the distribution of property that is within the State. Id., at 539. Under the circumstances of Pope, supra, this Court concluded that "there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empowers this Court to nullify the deliberate choices of the elected representatives of the people. . . ." Id. at 540.

In Mullane, supra, a New York trust company had exclusive management and control of a common trust fund established by it under a state banking law to invest assets of numerous small trusts of which it was trustee. The trust company petitioned for a judicial settlement of accounts that

would be binding and conclusive as to any matter upon everyone having any interest in the common fund or in any participating trust. Although the Court held that the beneficiaries' notice by publication, called for by the banking statute, was inadequate under the circumstances, it stated that, in general, it was not unreasonable

> for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered, upon investigation, do not in due course of business come to the knowledge of the common trustee.

339 U.S. at 317.

The Court explained that the practical difficulties and costs associated with notifying interested parties must be considered, because

> such impracticable and extended searches are not required in the name of due process. . . . These are practical matters in which we should be reluctant to disturb he judgment of the state authorities.

Id. at 317-18.

If, as Mullane urges, this Court will give "due regard for the practicalities and peculiarities of the case," then it will decline to interfere with Florida's probate scheme that would appear, on the face of it, to be intended to achieve two important public policy objectives: (1) to encourage the timely and efficient settlement of estates; and (2) to facilitate the marketability of real property passing from an estate by permitting a bona fide purchaser to rely on the order of sale without having to examine the proceedings that were held before the issuance of that order.

Chaos would likely ensue if every party wishing to purchase real property from an estate were required to go behind the order of sale to conduct an exhaustive search of the probate and real property records to determine whether the personal representative who is offering the property for sale was properly authorized to do so.

The circumstances of this case clearly demonstrate why the probate statute of which Johnson complains is necessary. Anderson could not have been expected to have discovered the existence of Johnson and of her claim on the real estate without an unduly lengthy, impractical, and expensive search of the probate and real property records. Section 733.613 offers the reassurance that is necessary to insure that prospective purchasers of real property from personal representatives of estates will not be scared away by the expense, difficulty, and uncertainty associated with verifying for themselves that nothing was amiss in the settlement of the estate, the appointment of the personal representative, and

the manner in which the personal representative carried out his or her duties.

In short, a prospective purchaser is entitled to accept at face value the order of sale authorizing the disposition of the estate's property. That this may present difficulties for a particular heir in a highly unusual set of circumstances is unfortunate, but it does not justify eliminating a procedure that serves the vast majority of the population, heirs and bona fide purchasers alike, well.

CONCLUSION

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari for the reasons stated above.

Respectfully submitted,

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